

# International Securities and Capital Markets\*

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There have been numerous new developments in the securities and capital markets regulations in 2008. Many of these changes across several jurisdictions were intended to bring together capital markets and harmonize international securities regulations in the EU, South America, and other regions. Other changes were prompted by the unprecedented financial crisis, which began in September 2008 and affected most countries to some degree. The following article provides a summary of this year's new regulations in international securities and capital markets in a number of countries around the world including Brazil, Germany, Japan, New Zealand, Peru, Poland, Russia, the United Kingdom, and the United States.

## I. Developments in Brazil

The two most important developments affecting the capital markets in Brazil in 2008 were the creation of BM&FBOVESPA S.A.—Securities, Commodities and Futures Exchange (*Bolsa de Valores, Mercadorias e Futuros* or BM&FBOVESPA) and the classification of Brazil's sovereign debt as investment grade.

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BM&FBOVESPA is a new legal entity created with the integration between the two major Brazilian exchanges, the Brazilian Mercantile & Futures Exchange (BM&F) and the São Paulo Stock Exchange (Bovespa),<sup>1</sup> and together they have formed the third largest exchange worldwide in terms of market value, the second largest in the Americas, and the leading exchange in Latin America.<sup>2</sup>

The transaction was duly approved by the Brazilian Administrative Council of Economic Defense (*Conselho Administrativo de Defesa Econômica* or CADE),<sup>3</sup> and BM&FBOVESPA has been duly registered as a publicly-held corporation with the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários* or CVM) as of August 11, 2008.<sup>4</sup>

The markets of the two combined exchanges include: (a) equity and corporate fixed income stocks, Brazilian depository receipts (BDR), exchange traded funds (ETF), real estate investment trusts (REIT), investment funds and real estate receivables, corporate bonds, commercial paper, and share receipts; (b) agricultural derivatives including crystal sugar, cotton, cattle feeder, live cattle, Arabica coffee, robusta conillon coffee, ethanol, corn, and soybeans; (c) financial derivatives including gold, stock indices (e.g., Ibovespa, IBRX-50), inflation indices (e.g., IGP-M, INPC, IPCA), foreign exchange and interest rate swaps, and sovereign debt instruments; (d) mini-contracts based on live cattle, coffee, dollars, and the Ibovespa stock index; (e) over-the-counter (OTC) derivatives including forwards, swaps, and flexible options; (f) spot dollar transactions (with settlement in T+0, T+1, and T+2); and (g) government-issued securities including those with floating and fixed rates and rates indexed to inflation and foreign exchange rates.<sup>5</sup>

On September 30, 2008, BM&FBOVESPA started the order routing of BM&F derivative products using the CME Globex<sup>6</sup> electronic trading platform. The order routing

1. Additional information about the creation of BM&FBOVESPA and related documents is available at [www.bmfbovespa.com.br](http://www.bmfbovespa.com.br). Extraordinary meetings of the shareholders of each of BM&F S.A. and Bovespa Holding S.A. were convened on May 8, 2008, at which the shareholders of the two corporations approved a merger of the assets and liabilities of BM&F into BM&FBOVESPA, a new entity, and a merger of the shares of Bovespa Holding into the same entity. BM&FBOVESPA absorbed the assets and liabilities of BM&F for the book value of its shareholders' equity, whereby the shares of Bovespa Holding were merged at their market value.

2. See BM&FBOVESPA, History, <http://www.bmfbovespa.com.br/english/historia.asp> (last visited Feb. 15, 2009).

3. On July 9, 2008, CADE, the Brazilian antitrust enforcement agency, approved without any restrictions the integration of the activities of the two exchanges through Monopolistic Act (*Ato de Concentração*) No. 08012.005300/2008-13, which was publicly announced by BM&FBOVESPA on the following day. BM&FBOVESPA, Brazil's anti-trust agency approves merger of BM&FSA and Bovespa Holding S.A. (July 10, 2008), <http://www.bmfbovespa.com.br/english/080710NotA.asp>.

4. BM&FBOVESPA stock is registered to be traded on the São Paulo Stock Exchange under the ticker BVMF3 and is admitted to trade on the New Market (*Novo Mercado*), an exchange that requires the highest level of corporate governance practices in Brazil.

5. See BM&FBOVESPA, Markets, <http://www.bmfbovespa.com.br/english/Mercados.asp> (last visited Feb. 15, 2009).

6. CME Group is deemed to be the world's largest and most diverse derivatives exchange, formed by the 2007 merger of the Chicago Mercantile Exchange (CME) and the Chicago Board of Trade (CBOT). Both exchanges (CME Group and BM&FBOVESPA) maintain a commercial agreement, establishing, among other items, cross investment through an exchange of shares, a long-term partnership between both entities, and lock-up and exclusivity rights. The basis terms of this commercial agreement is available at BM&FBOVESPA, Commercial Agreement, <http://www.cmegroup-bmfbovespa.com.br/pages/eng/agreement.asp> (last visited Feb. 15, 2009).

linkage will enable customers in more than eighty countries using this platform to trade BM&FBOVESPA products directly.<sup>7</sup> Beginning in the fourth quarter of 2008, BM&FBOVESPA customers will have the ability to trade CME Group products directly through their BM&FBOVESPA connections.<sup>8</sup>

Finally, in continuing its administrative integration process and corporate reorganization, BM&FBOVESPA incorporated its controlled companies, the São Paulo Stock Exchange S.A. (*Bolsa de Valores de São Paulo S.A.* or BVSP) and the Brazilian Clearing and Depository Corporation (*Companhia Brasileira de Liquidação e Custódia* or CBLC),<sup>9</sup> which will allow BM&FBOVESPA to perform the activities that are currently carried out by the merged companies. BVSP is a wholly-owned subsidiary of BM&FBOVESPA and operates the São Paulo Stock Exchange and organized over-the-counter markets. Through CBLC, its wholly-owned subsidiary, BVSP also performs other activities including clearing and settlement of securities, acting as central counterparty (CCP) and central securities depository (CSD), and offering custodial and securities lending services.<sup>10</sup> Moreover, market surveillance and oversight activities are performed independently through BVSP and CBLC's affiliate, Bovespa Markets Supervision (*Bovespa Supervisão de Mercados* or BSM).<sup>11</sup>

Another important development that should be mentioned herein is the investment-grade classification of Brazil's sovereign debt. On April 30, 2008, Standard & Poor's (S&P) was the first rating agency to upgrade Brazil's long term foreign currency sovereign debt to the first investment-grade level, increasing the country's rating from double B plus (BB+) to triple B minus (BBB-), which is a major symbolic milestone and reflects significant accomplishments of the Brazilian government and economy.<sup>12</sup> On May 29, 2008, the same investment-grade status was recognized and ratified by Fitch Ratings (Fitch).<sup>13</sup>

7. See Press Release, BM&FBOVESPA, CME Group, BM&FBOVESPA Announce September 30 State Date for Order Routing (Aug. 29, 2008), <http://www.reuters.com/article/pressRelease/idUS130815+29-Sep-2008+PRN20080929>. These products include futures and options based on One Day Inter-Bank Deposits and the BOVESPA Stock Index, which is pending regulatory approval, and commodities such as Arabica coffee, live cattle, and corn.

8. See *id.* These products include CME Group futures and options based on interest rates, equity indices, foreign exchange rates, commodities, and energy and metals products.

9. The Board of Directors of BM&FBOVESPA approved on October 21, 2008: (i) the transaction by approving the Protocol and Justification of Merger that was executed by the individual companies' managements on that date and (ii) the calling for November 28, 2008, of the Extraordinary General Meeting of the shareholders of BM&FBOVESPA to approve the merger. All the documents are available in the websites of CVM and BVSP. See CVM, [www.cvm.gov.br](http://www.cvm.gov.br); BVSP, [www.bovespa.com.br](http://www.bovespa.com.br).

10. See BOVESPA, São Paulo Stock Exchange and the Brazilian Capital Market, [http://www.bestbrasil.org/pages/publications/bovespa/Sao\\_Paulo\\_Stock\\_Exchange\\_and\\_the\\_Brazilian\\_Capital\\_Market.pdf](http://www.bestbrasil.org/pages/publications/bovespa/Sao_Paulo_Stock_Exchange_and_the_Brazilian_Capital_Market.pdf) (last visited Feb. 15, 2009).

11. For additional information regarding BM&FBOVESPA, see BM&FBOVESPA, MANAGEMENT REPORT (2008), [http://www.bmfbovespa.com.br/InstDownload/Comunicado\\_14jul08\\_2I.pdf](http://www.bmfbovespa.com.br/InstDownload/Comunicado_14jul08_2I.pdf).

12. See Press Release, Standard & Poor's, S&P Raises Brazil to Investment Grade (Apr. 30, 2008), [http://www2.standardandpoors.com/portal/site/sp/en/la/page.hottopic/BrazilUP\\_sp\\_viewpoint/3,1,1,0,0,0,0,0,0,0,0,0,0,0,0,0.html](http://www2.standardandpoors.com/portal/site/sp/en/la/page.hottopic/BrazilUP_sp_viewpoint/3,1,1,0,0,0,0,0,0,0,0,0,0,0,0,0.html).

13. See Press Release, Fitch Ratings, Fitch Upgrades Brazil to Investment Grade; IDRs to 'BBB-' (May 29, 2008), [http://www.fitchibca.com/corporate/resource\\_detail.cfm?pr\\_id=422072&frompage=&reset=teleconf\\_det](http://www.fitchibca.com/corporate/resource_detail.cfm?pr_id=422072&frompage=&reset=teleconf_det).

## II. Developments in Germany

### A. RISK LIMITATION ACT

With Germany's Securities Trading Act<sup>14</sup> being amended by the so-called Risk Limitation Act of August 12, 2008,<sup>15</sup> investors in German listed companies are now facing expanded transparency requirements.

#### 1. *Acting in Concert*

Acting in concert is a concept under which voting rights owned by one party are fully attributed to another party with whom the first party cooperates for the purposes of (i) disclosing such parties' combined voting power under the rules on the disclosure of material shareholdings in listed companies and (ii) preventing the circumvention of the requirement to launch a mandatory offer for the outstanding shares of the target company.

The previous acting in concert rule has been construed restrictively by the German Federal Supreme Court. According to the Federal Supreme Court, parties are acting in concert only where such parties coordinate the exercise of their voting rights in the shareholder meeting on more than one occasion.<sup>16</sup>

Under the Risk Limitation Act, the definition of parties acting in concert is broader than the Federal Supreme Court's interpretation and provides that a shareholder or its subsidiary and a third party will in the future be deemed to be acting in concert if they coordinate the exercise of their voting rights or otherwise change the entrepreneurial direction of the target company materially and on a long-lasting basis. In the legislative materials, a fundamental change of the business model or a disposal of material business divisions are quoted as examples of a change in the entrepreneurial direction. Furthermore, the objective of the coordinated effort must be sustainable and of great importance for the entrepreneurial direction of the target company.<sup>17</sup>

The present exemption relating to individual cases of coordinated conduct will continue to apply. Even more so, it applies not only to a coordinated exercise of voting rights but also to a coordinated effort to change the entrepreneurial direction materially and on a long-lasting basis. Moreover, it is explained in the legislative materials that, as a rule, neither individual cases of the joint exercise of voting rights in different matters nor the repeated joint exercise of voting rights in the same matter will lead to an attribution of voting rights. In particular, neither the joint exercise of voting rights in relation to several subject matters to be resolved in shareholder meetings alone nor the coordination in relation to the nomination of supervisory board candidates will, as a rule, result in an attribution of voting rights. The formation of coalitions within the supervisory board does not constitute acting in concert. This is expressly clarified in the legislative materials.

14. Gesetz über den Wertpapierhandel / Wertpapierhandelsgesetz [Securities Trading Act], Sept. 9, 1998, BGBl. I 2708 [hereinafter WpHG].

15. Gesetz zur Begrenzung der mit Finanzinvestitionen verbundenen Risiken (Risikobegrenzungs-gesetz) [Risk Limitation Act], Aug. 18, 2008, BGBl. I 1666.

16. See Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 18, 2006; Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] II ZR 137/05 (F.R.G.).

17. See WpHG, *supra* note 14, § 22 para. 2; see also Wertpapiererwerbs- und Übernahmegesetz [Securities Acquisition and Corporate Takeover Act] Dec. 20, 2001 BGBl. I at 3822 § 30 para. 2 (F.R.G.).

## 2. *Disclosure of Shareholdings and Financial Instruments*

Under the Securities Trading Act, voting rights in listed companies must be disclosed when a person's or entity's shareholdings in such company reach or exceed three percent of all voting rights in the target company. Investors holding financial instruments conferring the right to acquire shares with voting rights must make disclosure when the voting rights that can be acquired pursuant to such financial instruments reach, exceed, or fall below a threshold of five percent (or more) of all voting rights in the target company.<sup>18</sup> Whilst under the previous rule there was no aggregation of voting rights appertaining to shares and voting rights appertaining to shares that can be bought pursuant to financial instruments, the new rule requires that voting rights appertaining to shares and voting rights appertaining to shares that can be bought pursuant to financial instruments be aggregated.<sup>19</sup> No notification obligation will therefore be triggered where 2.99% of the voting shares plus financial instruments representing two percent of the voting rights are held because the aggregated number of voting rights remains below the five percent threshold applicable to financial instruments.

The new aggregation rule will become effective on March 1, 2009. Under the transitional rules, holders of voting shares and financial instruments who reach or exceed a disclosure threshold only because of the new aggregation rule are under no notification obligation. Disclosure will not be required until another disclosure threshold has been reached or exceeded or fallen short of.<sup>20</sup> Investors are therefore presented with the opportunity until March 1, 2009, to build up a combined position of shares and financial instruments of up to 9.99% that can remain undisclosed.

## 3. *Disclosure of Investor Objectives*

Furthermore, as from May 31, 2009, shareholders reaching or exceeding ten percent or a higher disclosure threshold will have to inform the company within twenty stock exchange trading days after such threshold has been reached or exceeded about their objectives and about the origin of their funding.<sup>21</sup> Any change of objectives must be notified without undue delay within twenty stock exchange trading days. Such notification obligations do not apply if the company's articles of association provide for a waiver of such obligation (opt-out). The company has to publish the information received, or the fact that the notification obligation has not been fulfilled, without undue delay and in any event no later than within three stock exchange trading days.<sup>22</sup>

## 4. *Sanctions*

With the Risk Limitation Act taking effect, a violation of the disclosure requirements under the Securities Trading Act results in the loss of shareholder rights (e.g., voting rights and, under certain pre-conditions, dividend rights) not only for as long as the violation is ongoing, but also for a period of six months following rectification of the violation

18. See *WpHG*, *supra* note 14, § 25 para. 1.

19. See *id.* § 25 para. 1, 3rd sentence.

20. See *id.* § 41 para. 4b.

21. See *id.* § 27a.

22. See *id.*

if the violation is based on willful misconduct or on gross negligence. The six-month period does not apply; however, if the inaccurately disclosed voting share deviates from the actual voting share by less than 10 percent, and no notification of reaching or breaching a disclosure threshold has been omitted.<sup>23</sup> As the German Federal Government believes that aggressive investors build up undisclosed shareholdings and make the necessary disclosure only immediately prior to the shareholder meeting, the new rule is designed to shorten the period during which such investors can build up shareholdings and leave their positions undisclosed.

#### B. CASH-SETTLED FINANCIAL INSTRUMENTS

Cash-settled financial instruments, as they were used in the context of Schaeffler's EUR 12.1 billion hostile tender offer for automotive supplier Continental<sup>24</sup> or as used by Porsche for purposes of its investment in Volkswagen,<sup>25</sup> are not disclosable under German law. Although these landmark transactions do not represent a change in German law, they do shed light on the reach of German disclosure obligations with respect to cash-settled financial instruments.

### III. Developments in Japan

#### A. ECONOMIC CRISIS AND GOVERNMENT RECOVERY PLAN

While not feeling the full force of the global economic crisis, Japan's export-dependent economy sustained more damage than initially hoped.<sup>26</sup> The Nikkei Stock Average sank to a twenty-six year low in late October 2008, and shares on the Tokyo Stock Exchange closed at their lowest level since 2003. The Organization for Economic Co-operation and Development (OECD) forecast that Japan's economy would contract in 2009 but only by 0.1%—the smallest drop among the world's three largest economies.<sup>27</sup>

On October 30, 2008, Japan's Ministry of Finance finalized a package of broad economic measures designed to stabilize Japan's markets. In particular, the Financial Services Agency (FSA) revised its regulations on short selling<sup>28</sup> by requiring traders to disclose and

23. See *id.* § 28.

24. See Press Release, Schaeffler Group, Schaeffler Gruppe strebt strategische Beteiligung an der Continental AG an (July 15, 2008), <http://www.ina.de/content.ina.de/en/press/press-releases/press-details.jsp?id=2922880>.

25. See Press Release, Porsche, Porsche Heads for Domination Agreement (Oct. 26, 2008), <http://www.porsche-se.com/pho/en/news/?pool=pho&id=2008-10-26>.

26. Turmoil in the American subprime mortgage market during 2008 did not hit Japan's financial institutions as hard as those in the United States and Europe primarily because Japanese firms had less exposure to that market. During Japan's long recession, which began in the mid-1990s, Japanese banks—struggling to remove bad loans from their books and repay public funds—could not afford a robust expansion of their operations. Thus, they did not invest nearly as heavily as their foreign competitors did in subprime-loan-related products, including U.S. residential mortgage-backed securities.

27. See ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], 2009 GLOBAL ECONOMIC FORECAST—JAPAN (2009), <http://www.oecd.org/dataoecd/45/48/20431842.pdf>.

28. See Press Release, Financial Services Agency (FSA), FSA Strengthens Restrictions on Short Selling (Oct. 27, 2008), <http://www.fsa.go.jp/en/news/2008/20081027-2.html>. In general terms, a short sale is a market transaction in which an investor sells borrowed securities in anticipation of a price decline and is required to return an equal number of shares at some point in the future. The gain (or loss) the investor realizes is

verify their short positions and by instituting a general “uptick rule” that requires every short sale transaction be entered at a price that is higher than the price of the previous trade. The new securities regulation is intended to prevent short sellers from exacerbating the downward momentum of a traded asset when its price is already experiencing sharp declines.<sup>29</sup> In addition, the FSA prohibited all “naked short selling” as of October 30th.<sup>30</sup>

The FSA and the Accounting Standards Board of Japan were also considering temporarily suspending Japan’s so-called “mark-to-market” rule that requires companies to book their financial instruments at market value, reflecting paper losses from price fluctuations in the marketplace. The proposed freeze of the accounting rule would help ease the realization of large fluctuations—mostly extraordinary losses—at a time when these holdings can be difficult to accurately value and when the holder expects their value to increase. The proposal under consideration would apply only to financial instruments held by financial and non-financial firms and would not cover their shareholdings.<sup>31</sup> Most banks carry paper losses in their stock portfolios, and industry rules require the shortfalls to be subtracted from their capital bases. Because many Japanese banks are now experiencing capital shortfalls, they strongly support a new rule that would extend any freeze on mark-to-market accounting to stockholdings as well as to financial instruments.

Because Japan’s biggest banks were generally in much better financial shape during 2008 than their counterparts in the United States and Europe, Japan’s government had no concrete plans to fortify their capital bases with the direct injection of public funds. But, a bill was submitted to the Diet (Japan’s parliament) in October 2008, enabling the injection of taxpayer money to *regional* financial institutions. At the same time, the Diet was considering an additional measure to have the Banks’ Shareholdings Purchase Corporation—a somewhat dormant, quasi-public institution created in 2002 during a debt crisis—start buying shares from troubled banks.<sup>32</sup> Meanwhile, Japan’s largest banks announced plans to seek fresh capital with new issues of preferred and common shares.<sup>33</sup>

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equal to the amount received on the sale of the borrowed shares, less the cost of repurchasing the borrowed shares.

29. The so-called uptick rule first appeared in the U.S. Securities Exchange Act of 1934 as Rule 10a-1. The SEC eliminated the rule on July 6, 2007, but is currently studying whether it should be reinstated. In general, under U.S. securities regulations, the uptick rule is disregarded when trading some types of financial instruments such as futures, currencies, or market exchange traded funds since these instruments are highly liquid and have enough buyers willing to enter into a long position, ensuring that the price will rarely be driven to unjustifiably low levels.

30. See Press Release, FSA, *supra* note 28. The term “naked short selling” refers to short sales in which stocks are not even in the seller’s possession (i.e., not borrowed) at the time of selling—much like a third-party bet on the outcome of an event.

31. See *id.*

32. The Banks’ Shareholding Purchase Corp. (BSPC) was established at a time when Japan’s traditional *keiretsu* corporate structure was unwinding and many Japanese firms were trying to sell their cross-shareholdings—most of which had lost a great deal of value. The BSPC bought shares in financially distressed companies between 2002 and 2006. The new government plan would enable the BSPC to acquire bank stocks held by non-financial firms and authorize increased government guarantees of BSPC’s loans to 20 trillion yen, up from 2 trillion yen. According to the plan being considered in late 2008, the new provisions would be in place until the year 2012. See *Govt Eyes Major Expansion of Share Purchase Program*, NIKKEI, Dec. 19, 2008.

33. By the end of November 2008, Japan’s three Megabanks—Mitsubishi UFJ Financial Group, Inc., Mizuho Financial Group, Inc., and Sumitomo Mitsui Financial Group Inc.—all had announced plans for new stock offerings. See *Priority: Scrape for Capital*, NIKKEI, Dec. 1, 2008.

## B. REVISIONS TO FINANCIAL INSTRUMENTS AND EXCHANGE LAW

On June 6, 2008, the Diet passed a broad package of amendments to the Financial Instruments and Exchange Law<sup>34</sup> aimed at strengthening the competitiveness of Japan's financial and capital markets. The statutory amendments, which will pave the way for greater diversification of financial products and create a more flexible and vibrant market for start-up and high growth companies, constitute Japan's first major attempt to overhaul its financial markets since 1996, when it passed a broad package of reforms patterned on the United Kingdom's "Big Bang" legislation.

The centerpiece of the new legislation is a set of provisions aimed at creating a new, more flexible, high-risk, high-return market exclusively for professional investors. The amendments are intended to establish a market similar to the Alternative Investment Market (AIM) in the United Kingdom for start-up companies, and to the U.S. market based on Rule 144A of the U.S. Securities and Exchange Act.<sup>35</sup> The government hopes the new market will provide fundraising opportunities for both domestic and foreign high-growth companies that are reluctant to list on Japanese exchanges due to cumbersome requirements. Under the amendments, securities sold to "professional investors" will be exempt from meeting certain onerous and time consuming information disclosure provisions of the FIEL, although the Tokyo Stock Exchange and other bourses are still free to set their own disclosure rules. Brokers will be banned from selling products traded on the new market to non-professional investors, although non-professionals can participate indirectly by buying into exchange traded investment trusts.

The 2008 amendments to the FIEL also sanction a much wider range of products that can be linked to exchange-traded funds (ETFs).<sup>36</sup> ETF investments in Japan are presently limited to stocks and bonds, but the new rules enable ETFs to be linked to a broad assortment of financial products, derivatives, and commodities. Moreover, the new law enables

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34. See 2008 Amendments to Financial Instruments and Exchange Act, Law of June 6, 2008. Kinyu shohin torihikiho [Financial Instruments and Exchange Law], Law No. 25 of 1948, as amended by Law No. 65 and Law No. 66 of 2006 [hereinafter FIEL]. An English summary of the 2008 bill amending the FIEL—most provisions of which were passed into law—is available at Financial Service Agency's website. FSA, FSA publishes the Plan for Strengthening the Competitiveness of Japan's Financial and Capital Markets (Dec. 21, 2007), <http://www.fsa.go.jp/en/news/2007/20071221.html>. The various provisions of the sweeping FIEL took effect between 2006 and 2008. An English translation of the FIEL is available on the Financial Services Agency's website at: <http://www.fsa.go.jp/common/law/fie01.pdf>. For a brief overview of the FIEL, see Pamela A. Fuller, *International Investment and Development—Japan*, 42 INT'L LAW. 511, 518-23 (2008).

35. In October 2007, the Tokyo Stock Exchange Group, Inc. (TSE) and the London Stock Exchange Group PLC signed a joint venture agreement aimed at establishing a new stock market for Japanese and Asian start-up companies. Under the plan, the new market will be based in Tokyo and patterned on London's Alternative Investment Market (AIM) for young companies. See Press Release, London Stock Exchange, Tokyo Stock Exchange and London Stock Exchange to Establish a New Growth Market (Oct. 30, 2007), <http://www.londonstockexchange.com/NR/exeres/73DF19C4-44CA-4B26-B76E-4C52D213C23B.htm>. Still unnamed, the new market is scheduled to begin operating by 2009 and is part of Japan's broader effort to promote Tokyo as a revitalized international financial center similar to New York's Wall Street. A new exchange for start-ups could help the TSE's reputation, which has been tarnished by recent technological glitches, high listing fees, a precipitous drop in the number of listings by foreign issuers, and failure of the exchange to form strong strategic alliances with other major bourses.

36. Exchange traded funds (ETFs) enable investors to diversify their portfolio easily and at lower costs than investing in individual stocks. ETFs are also more flexible investments than unlisted trusts in that ETFs can be rapidly traded at market prices on exchanges.



bankers to directly trade in greenhouse gas emission credits—opening the door to the establishment of a carbon credit market in Japan.<sup>37</sup>

The revised law relaxes regulations that prevent insurance companies, banks, and brokers from working together in a complementary way. The new rules, which are intended to exploit latent synergies between these financial services' operations, will also eliminate the rule prohibiting an official at one company from holding a concurrent post at another company within the same financial group. Finally, the amendments greatly increase the penalties for insider trading, market manipulation, and other white collar crimes—in some cases doubling the monetary fine first established under the FIEL in 2006. Under the revised law, many of the monetary penalties and fines related to market fraud will be determined by the differential between the stock price before the violation and the highest price during the two-week, or month-long, period after the violation. For example, the penalty for insider trading will be based on the highest selling price following the two-week period after the inside information was published.<sup>38</sup>

#### C. PLANS TO REMOVE LEGAL BARRIERS TO COMMODITIES AND STOCK EXCHANGE TIE-UPS

In November, as prices on all bourses dropped precipitously, the Ministry of Economy, Trade and Industry (METI) and the Financial Services Agency (FSA) announced plans to introduce bills to Japan's Diet in 2009 to enable Japan's stock and commodities exchanges to combine with each other.<sup>39</sup> Such tie-ups are viewed by the government (and most market professionals and participants) as necessary in order to create a more modern and dynamic trading environment, to increase the convenience for market participants, and to help Japan compete more effectively in the international marketplace.<sup>40</sup>

The forthcoming bills are expected to propose amendments to Japan's Commodities Exchange Act<sup>41</sup> and possibly further amendments to the FIEL,<sup>42</sup> which was last amended in June 2008. Presently, the Commodities Exchange Act prohibits any single investor from owning more than five percent of the voting rights in a commodities exchange and also prohibits a commodity exchange from owning more than twenty percent of a stock exchange.<sup>43</sup> These restrictions effectively preclude stock and commodities exchanges from owning each other and also make it legally impossible for them to be combined as brother-sister corporations under a common parent holding company. The proposed

37. See FIEL, *supra* note 34.

38. See *id.*

39. See Govt. *Aims to Remove Barrier to Stock, Commodity Exchange Tie-ups*, NIKKEI, Nov. 26, 2008.

40. See Ministry of Economy, Trade and Industry, [Bill to Amend the Commodities Exchange Law] (forthcoming 2009). See also FSA, [Bill to Amend the Financial Instruments and Exchange Law], Jan. 2009 (forthcoming 2009).

41. [Commodities Exchange Act], Law No. 239 of 1950, as amended. An unofficial English translation of Japan's Commodities Exchange Act, reflecting amendments up to the year 2006, is available at <http://www.cas.go.jp/jp/seisaku/hourei/data/cea.pdf>.

42. See FIEL, *supra* note 34.

43. See Commodities Exchange Act, *supra* note 41.

statutory amendments will remove these restrictions and could take effect as early as 2010.<sup>44</sup>

Neither European nor U.S. law imposes comparable barriers to the combination of stock and commodities exchanges; single corporations typically operate several exchanges in a holding company structure. Tie-ups between stock and commodities exchanges have recently become more common, with the world's largest futures exchange, the CME Group, Inc., acquiring Nymex Holding, Inc. earlier this year.

In order to take advantage of the forthcoming laws allowing them to combine their operations by means of equity tie-ups, Japan's stock and commodities exchanges are reorganizing themselves into joint stock corporations. The Tokyo Stock Exchange was reorganized into a holding company structure last year, similar to that of the New York Stock Exchange. Osaka Stock Exchange Corporation, already a joint stock corporation, launched a tender offer in November 2008 to make Jasdax Securities Exchange Inc. its wholly owned subsidiary, a move that could trigger more reorganizations of bourses for start-up companies. The Tokyo Commodities Exchange, meanwhile, plans to become a stock corporation in December 2008 following an initial public offering. The Tokyo Grain Exchange plans to remain an unincorporated membership organization.

#### IV. Developments in New Zealand

As with most of the world, 2008 has proved rather eventful in New Zealand's securities regulation landscape. Most of the changes to New Zealand law, however, have in fact been in development for some time. Perhaps as a result, the Securities Commission of New Zealand (the Securities Commission) and the New Zealand Stock Exchange (NZX) have not rushed to make major regulatory changes in response to the market turmoil of the last few months, though a few "tweaks" have occurred. Some of the key developments of this year are discussed below.

##### A. TRANS-TASMAN MUTUAL RECOGNITION OF SECURITIES OFFERINGS

One of the most practically significant developments in New Zealand securities law this year has been the implementation of the Trans-Tasman Mutual Recognition of Securities Offerings scheme (MSRO).<sup>45</sup> The Australian and New Zealand Governments have each introduced 'mirror' legislation in a further step towards establishing a single economic market for the two countries.<sup>46</sup> Issuers of securities in New Zealand or Australia may now offer shares, debentures, or managed or collective investment schemes to investors in the

44. For a detailed explanation of the Japanese government's policy reasons for wanting to amend the Commodities Exchange Act and the FIEL to allow for capital alliances between stock and commodities exchanges, see the Report by the First Subcommittee of the Sectional Committee on the Financial System of the Financial System Council—Toward Building Reliable and Vibrant Markets 12-13, Dec. 17, 2008 (provisional English translation), available at <http://www.cas.go.jp/jp/seisaku/hourei/data/cea.pdf>.

45. See Securities Act 1978 (NZ Securities Act) pt. 5, 1978 S.N.Z. No. 103, available at [www.legislation.govt.nz](http://www.legislation.govt.nz); Securities (Mutual Recognition of Securities Offerings—Australia) Regulations 2008 (the NZ mutual recognition regulations), 2008 S.N.Z. No. 91, available at [www.legislation.govt.nz](http://www.legislation.govt.nz) (N.Z.).

46. See Corporations Act 2001 (Australian Corporations Act) ch. 8, 2001 S.N.Z. No. 30, available at [www.comlaw.gov.au](http://www.comlaw.gov.au) (Austl.); Corporations Amendment Regulations 2008 (No.2) (the Australian mutual recognition regulations), amending the Corporations Regulations 2001, available at [www.comlaw.gov.au](http://www.comlaw.gov.au) (Austl.).

other country using the (New Zealand) prospectus or (Australian) product disclosure statement required for the offering in the home jurisdiction. Certain additional requirements must be complied with including specific disclosure relevant to investors in the foreign jurisdiction. The MSRO, however, greatly reduces the compliance cost burden on issuers wishing to offer products in both jurisdictions.

## B. CHANGES TO THE SECURITIES MARKETS ACT 1988

Changes to the Securities Markets Act 1988 (the Securities Markets Act), which have been on the horizon for some time, finally came into effect in February this year with the passing of necessary regulations.

The changes include:

- A new insider-trading regime, which does away with the previous requirement for a relationship to the issuer. Now, a person becomes an insider merely by possessing insider information; there is no need for that person to be, for example, an officer of that company.<sup>47</sup>
- A new law relating to market manipulation which prohibits:
  - Making false or misleading statements or spreading information that is likely to induce a person to trade, or that might affect the price of, the securities; and
  - Creating a false or misleading appearance of securities trading.<sup>48</sup>
- It is to be noted that the law specifically states that short selling is not considered market manipulation in and of itself.<sup>49</sup>
- Altered substantial security holder disclosure obligations, now requiring disclosure of a relevant interest in five percent of the listed securities in any class (rather than five percent of the total number of voting securities of an issuer, as under the old law).<sup>50</sup>

Along with all the above changes to the Securities Markets Act, increased penalties have been imposed, with criminal liability introduced, along with civil penalties of up to one million New Zealand dollars.<sup>51</sup>

## C. NEW LAWS TO GOVERN FINANCIAL ADVISERS

The year 2008 has seen a comprehensive new regime imposed on financial advisers. In addition to the Securities Markets Act changes noted above, under a new part of that Act, investment advisers are now required to provide disclosure to clients about themselves, the products they advise on, and the way in which they receive payment for their advice.

Under the Financial Advisers Act, which was passed on September 27, 2008, financial advisers, any individuals who, in the course of business, give financial advice, make an investment transaction on behalf of another person (such as a brokerage services), or pro-

47. See Securities Markets Act 1988 §§ 8A-B, 1988 S.N.Z. No. 234 (as of May 2008), *available at* [www.legislation.govt.nz](http://www.legislation.govt.nz) (N.Z.).

48. See Securities Markets Act 1988 § 11.

49. See Securities Markets (Market Manipulation) Regulations 2007 cl. 20, 2007 S.R. No. 373, *available at* [www.legislation.govt.nz](http://www.legislation.govt.nz).

50. See Securities Markets Act 1988 § 21(2).

51. See, e.g., Securities Markets Act 1988 §§ 8F & 11A.

vide a financial planning service, will be supervised by the Securities Commission.<sup>52</sup> The new law also requires financial advisers to meet standards for competence, professional conduct, and disclosure, and is intended to make financial advisers accountable for the advice that they give to clients.<sup>53</sup>

Under the Financial Service Providers (Registration and Dispute Resolution) Act 2008, financial services providers (including financial advisers) will be required to register and join an approved dispute resolution scheme.<sup>54</sup>

The new laws relating to financial advisers and financial service providers will come into force on a date yet to be announced.

#### D. NEW LEGISLATION RELATING TO NON-BANK DEPOSIT TAKERS

New legislation has been passed relating to non-bank deposit takers, which includes finance companies.<sup>55</sup> The collapse of a significant number of New Zealand finance companies has been heavily discussed in the local media and, looking back, may perhaps be seen as a harbinger of the economic downturn now facing New Zealand and the rest of the world. This particular regulation, however, has been in the pipeline since long before any of the cracks in the economic system started to show.

Under the new legislation, the Reserve Bank of New Zealand Amendment Act 2008, the Reserve Bank is now the prudential regulator of non-bank deposit takers. The requirements of the Securities Act 1978<sup>56</sup> in relation to trust deeds, prospectuses, and investment statements will still apply; however, the supervisory roles of trustees and the Securities Commission will be augmented by that of the Reserve Bank, which will be able to require information from a deposit taker's trustee, develop and enforce prudential and governance requirements, and to impose credit rating requirements. Trustees will continue to be required to be authorized by the Securities Commission.<sup>57</sup>

It has been indicated by the Securities Commission that further regulations will be imposed on the industry, probably in 2010.<sup>58</sup> Such regulations are likely to impose standards relating to capital, liquidity, and related party lending.

52. See Financial Advisers Act 2008 § 10, 2008 S.N.Z. No. 91, available at [www.legislation.govt.nz](http://www.legislation.govt.nz); see Financial Advisers Act, 2008 pts. 3-5.

53. See Financial Advisers Act 2008 pt. 2.

54. See Financial Service Providers (Registration and Dispute Resolution) Act 2008 pts. 2-3, 2008 S.N.Z. No. 97, available at [www.legislation.govt.nz](http://www.legislation.govt.nz).

55. See Reserve Bank of New Zealand Act 1989 pt. 5D, 1989 S.N.Z. No. 157 (as amended on Sept. 10, 2008), available at [www.legislation.govt.nz](http://www.legislation.govt.nz).

56. See Securities Act 1978 pt. II.

57. See *id.* § 48.

58. See *Non-Bank Deposit Taker Legislation Passed*, BULLETIN (Sec. Comm'n, Wellington, N.Z.), Oct. 2008, at 3, available at [www.seccom.govt.nz/downloads/bulletin-45.pdf](http://www.seccom.govt.nz/downloads/bulletin-45.pdf).

## V. Developments in Peru

### A. LISTING OF FOREIGN ISSUED SECURITIES ON THE LIMA STOCK EXCHANGE

In March 2008, Conasev Resolution No. 015-2008-EF/94.01.1<sup>59</sup> issued by Peru's exchange and securities commission, Conasev,<sup>60</sup> modified Article 15 of the Regulation for Registration and Exclusion of Securities on the Stock Exchange in connection with the requirements to list foreign issued securities. Following this amendment, securities listed on a stock exchange or other organized market in countries that are *not* part of the Technical Committee of the International Organization of Securities Commissions (IOSCO)<sup>61</sup> can be listed automatically on the Lima Stock Exchange at the request of the issuer. In order to carry out such listing, the Lima Stock Exchange, at the request of the issuer, will file a proposal with Conasev accompanied by a technical report showing that the standards applied in connection with transparency of transactions, access to information, and corporate governance practices on such foreign stock exchange are similar or higher than those applicable in the Peruvian market.

This amendment also provides that in the case of foreign securities that are listed on a stock exchange or other organized market in countries that *are* part of the Technical Committee of IOSCO for which a listing on the Lima Stock Exchange was requested by a local authorized stock broker, such broker must act as a specialist<sup>62</sup> in the security, unless such security is already listed on the New York Stock Exchange (NYSE), National Association of Securities Dealers Automated Quotation (NASDAQ), or on a stock exchange or other organized market authorized by Conasev.<sup>63</sup>

### B. AMENDMENTS TO THE INVESTMENT FUND AND INVESTMENT FUND MANAGERS LAW<sup>64</sup>

In June 2008, Legislative Decree No. 1046<sup>65</sup> approved certain amendments to the Law of Investments Funds and their Management Entities. Pursuant thereto:

- Ownership of fund participation shares will only be recognized with respect to: (i) the individuals or entities appearing as owners in the Register of Participants held by the fund manager in the case of shares represented by certificates and (ii) the

59. See Conasev Resolution No. 015-2008-EF/94.01.1, Mar. 10, 2008, OFFICIAL GAZETTE, Mar. 13, 2008, available at [www.conasev.gob.pe/normas/resoluciones.asp](http://www.conasev.gob.pe/normas/resoluciones.asp).

60. Conasev (*Comisión Nacional Supervisora de Empresas y Valores*) is the national exchange and securities commission of Peru.

61. IOSCO is a leading international policy forum for securities regulators composed of a membership that regulates more than 90 percent of the world's securities markets. The Technical Committee is made up of fifteen agencies that regulate some of the world's more developed markets. Its members include: Australia, France, Germany, Hong Kong, Italy, Japan, Mexico, the Netherlands, Ontario, Quebec, Spain, Switzerland, the United Kingdom, and the United States. Existing legislation in Peru already provided for the automatic listing of foreign securities that are listed on a stock exchange or other organized market in countries that are part of IOSCO's Technical Committee.

62. A broker acting as a specialist with respect to a security is responsible for providing information and analysis on that security to any potential local clients requesting such information.

63. To date, Conasev has not yet authorized any foreign stock exchanges in this manner.

64. See Investment Fund and Investment Fund Managers Law, Legis. Decree No. 862, OFFICIAL GAZETTE, Oct. 22, 1996.

65. See Legis. Decree No. 1046, OFFICIAL GAZETTE, June 26, 2008.

individuals or entities appearing as owners in the electronic Registry held by Cavali, the Peruvian Settlement and Liquidation entity, in the case of participations represented by account entries.

- The requirement for prior authorization by Conasev for the incorporation of fund manager entities and their submission to the supervision of Conasev applies only in respect to fund managers that will publicly offer their share participations. Thus, fund managers that place their share participations privately are not subject to the requirements established by Conasev. They are obligated, however, to advertise clearly that Conasev does not supervise them and that all information provided to their investors is done in their sole responsibility.
- Fund managers may advertise the funds to be offered before their registration with Conasev provided that they clearly state that such funds are subject to registration, and their placement will only take place upon valid registration with Conasev.
- No fund participant can hold more than one third of the total fund, except for the founder participants and institutional investors, to whom only the limitations established in the relevant regulation of the fund will apply.
- In the case of liquidation of a fund manager, Conasev shall authorize the transfer of the fund to other managers or its liquidation if so decided by the fund participants.

### C. AMENDMENTS TO THE SECURITIES MARKET LAW<sup>66</sup>

In June 2008, a number of amendments to the Securities Market Law were approved by means of Legislative Decree 1061.<sup>67</sup> The most relevant changes concern the following:

- Presumptions regarding the access to privileged information by auditing firms and rating agencies hired by the issuer have been expanded to include all members of such entities involved in activities with the issuer.
- Registration of securities with the Securities Market Public Registry held by Conasev no longer implies that such securities have to be listed on the Lima Stock Exchange. This listing is now optional.
- Conasev is now entitled to request that a civil judge remove the banking and tax reserve<sup>68</sup> in respect of any individuals or entities being investigated thereby for violations of the Securities Market Law.
- In order to facilitate integration among stock exchanges and the simultaneous negotiation of securities in one or more local or foreign stock exchanges, Conasev may waive the fulfillment of certain requirements as long as there are agreements between the responsible entities in charge of conducting the respective centralized negotiation mechanisms.

66. See Securities Markets Law, restated by Supreme Decree 093-2002-EF, OFFICIAL GAZETTE, June 15, 2002.

67. See Legis. Decree No. 1061, OFFICIAL GAZETTE, June 28, 2008 (Peru).

68. Pursuant to the Peruvian Constitution, information on (i) bank deposits and accounts and (ii) tax returns and tax payments are reserved and can only be accessed with the authorization of the bank client and tax payer, respectively, or by order of a civil or criminal court.

## VI. Developments in Poland

Despite the current situation of the financial markets, the business and legal aspects of the Polish securities market continue to develop. In September 2008, the Polish Legislature adopted an amendment to the Act on Trading in Financial Instruments of July 29, 2005<sup>69</sup> (the Amendment), aimed at harmonizing Polish law with EU law<sup>70</sup> and increasing the competitiveness and the efficiency of the Polish securities market. The Amendment is currently subject to examination by the Polish Constitutional Tribunal regarding the Amendment's compliance with the Polish Constitution.

The Amendment will expand the list of financial instruments covered by it, particularly with regards to derivative instruments, the value of which is based on an underlying security, and decrease in the level of risk related to such instruments by including them in the National Depository for Securities (NDS) compensation system.<sup>71</sup> Additionally, the Amendment broadens the scope of investment advisory activity. The Amendment also aims at implementing various provisions pertaining to investment firm operations in Polish territory, such as: (i) mandatory notification to the Polish Financial Supervisory Authority (FSA) of an intention to make an indirect sale of stocks in a brokerage house,<sup>72</sup> (ii) conformity with Article 32 section 2 of the Markets in Financial Instruments Directive (MiFID) when the use of investment firm agents in Poland by a foreign company falls within the definition of conducting brokerage activity in Poland, (iii) the breakup of the monopoly of the NDS with respect to the settlement of transactions and entrusting other authorized entities to settle transactions conducted on the regulated market without divesting the NDS's right of supervision, (iv) the possibility to publicly quote securities issued by institutions of mutual investments with European Undertakings for Collective Investment in Transferable Securities (UCITS) status, (v) allowing the development of speculative strategies such as "short selling" and "repos," and (vi) the elimination of the supervisory duty of the FSA over banks conducting brokerage activity as well as eliminating the obligation of banks to financially isolate their brokerage activities and eliminating their obligations relating to capital adequacy maintenance.

There are also other proposed amendments covering a broadly-defined capital market that are currently subject to the legislative process in the Polish Parliament. One of the most important is the planned amendment to the Polish Commercial Company Code (KSH). The current wording of the KSH does not provide for separate provisions regarding the holding of annual general meetings for public and private companies pursuant to the Act of July 29, 2005, on Public Offering and Conditions of Introducing Financial Instruments to the Organized Trade and Public Companies.<sup>73</sup> The proposed amendment intends to provide such provisions.

69. See Journal of Laws No. 183, item 1538 (amended).

70. See Council Directive 2004/39, Apr. 21, 2004, 2004 O.J. (L105) (EC) (on markets in financial instruments "MiFID"); see also Council Directive 2006/49, 2006 O.J. (L177) 201 (on the capital adequacy of investment firms and credit institutions).

71. The compensation system, managed by the NDS based on the Act (EC) on Trading in Financial Instruments, aims at protecting investment firm clients in case of, inter alia, bankruptcy of a brokerage house and is compulsory for brokerage houses operating on the territory of Poland.

72. An indirect sale occurs when the sale of shares by a brokerage house's shareholder causes a decrease of such shareholder's voting power at a shareholders' meeting below the level of 50 percent.

73. See Journal of Laws No. 184, item 1539 (1995) (amended).

The proposed amendment (marked as form 1130) introduced to Parliament on October 8, 2008, aims to implement into Polish law the provisions of Directive 2007/36/EC of the European Parliament and Council of July 11, 2007, on the exercise of certain rights of shareholders in listed companies,<sup>74</sup> as well as Directive 2007/63/EC of the European Parliament and Council of November 13, 2007, amending Council Directives 78/855/EEC and 82/891/EEC regarding the requirement of an independent expert's report in the event of a merger or division of a public limited liability company.<sup>75</sup> Additionally, the proposed amendment provides for amending the KSH to require public companies holding shareholders' meetings to satisfy additional requirements related to the organization of such meetings as compared to private companies.

For example, the planned modifications, which in particular are designed to meet the expectations of foreign investors, provide for the possibility of providing notice of convening shareholders' meetings of public companies through the company's website or by using an information agency, as referred to in Article 58 of the aforementioned Act on Public Offering, instead of by publishing the notice in the Court Journal, *Monitor Sadowy i Gospodarczy*. At the same time, the proposed amendment provides for extending the required time period to convene general meetings of public companies from three weeks to twenty-six days that is associated with the record date (the date of registration as referred to in the amended Article 406<sup>1</sup> Section 1 of the KSH), which must be determined no later than within sixteen days prior to the meeting's date. This in turn follows from acts undertaken by the investment firms and the NDS in order to determine the list of authorized participants at such shareholders meetings.

The planned changes, moreover, grant greater autonomy to a company's Supervisory Board as regards convening extraordinary general meetings, which upon the amendment's effective date will be authorized to "act directly and autonomously," if deemed necessary.<sup>76</sup> The planned changes also allow for votes to be taken by written or electronic means.

The proposed amendment itself is at its initial legislative phase; therefore, details may still change. The direction of changes, however, seems interesting. While the proposed solutions should undoubtedly contribute to shaping the current procedure of organizing shareholders' meetings of public companies and facilitate the execution of corporate rights by foreign shareholders, it should also contribute to diminishing the costs of participation in the general meetings while preserving the possibility of shareholders directly taking part in them.

## VII. Developments in Russia

In April 2008, the Russian parliament passed a new law restricting foreign investors from buying shares in, or acquiring control over, Russian companies that are deemed of strategic importance to Russian defense and security. Among the companies particularly affected are those in the oil, gas, and defense-related industries.

74. See Council Directive 2007/36, 2007 O.J. (L 184) 17 (EC).

75. See Council Directive 2007/63, 2007 O.J. (L 300) 47 (EC).

76. See the proposed wording of KODEKS SPOLEK HANDLOWYCH [POLISH COMMERCIAL COMPANY CODE] [KSH] art. 399, § 2.



Driven by the introduction of the new law and its intention to keep liquidity of Russian companies within domestic financial markets, in June 2008 the Federal Financial Markets Service of the Russian Federation (FFMS) tightened rules on the placement and circulation of shares of Russian companies and their depository receipts outside Russia. The FFMS also lowered the percentage of securities that Russian companies (including the newly designated “strategic” companies) can place outside Russia.

#### A. RUSSIAN FEDERAL LAW NO. 57-FZ (THE LAW ON STRATEGIC COMPANIES)

##### 1. *Strategic Companies*

The Law on Strategic Companies designated forty-two types of business activities as being “of strategic importance” for the defense and security of the Russian state.<sup>77</sup> The list includes activities related to development of oil and gas deposits of “federal significance,” television and radio broadcasting covering half or more of the population of Russia, activities related to encryption, and space and nuclear related activities.<sup>78</sup>

The list is extensive and may apply to companies that conduct strategic activities as a minor or ancillary part of their business. For example, a Russian company or bank that merely has a license for any of the strategic activities could be deemed to be a strategic company.

##### 2. *Prior Consent for Certain Transactions*

Under the Law on Strategic Companies, the prior consent of a special governmental commission (established in July 2008) is required for transactions or agreements giving a foreign, i.e. non-Russian, private company any of the following rights in relation to a strategic company:

- (a) The right to more than fifty percent of shareholder votes;
- (b) the right to appoint a CEO or more than fifty percent of the collective executive body or directors;
- (c) the right to act as a management company; or
- (d) the right to determine the outcome of decisions of the strategic company’s governing bodies or to control its business activities.<sup>79</sup>

The Law also requires prior consent for foreign countries and international organizations (and any companies under their control) to acquire control over strategic companies (the same list of rights applies, but a twenty-five percent, rather than fifty percent, threshold is applied).<sup>80</sup>

##### 3. *Strategic Companies Using Federal Subsoil*

Parallel changes were introduced in relation to strategic companies using deposits of natural resources that are of “federal significance.” Requirements similar to those de-

77. See Law on Strategic Companies, Fed. Law No. 57-FZ art. 6 (2008).

78. See *id.*

79. See *id.* art. 7.

80. See *id.*

scribed above apply to transactions giving foreign private companies control over ten percent or more of the shareholder votes in these companies. The thresholds are five percent for transactions involving foreign countries, international organizations, and any companies under their control. Prior consent will be given to such transactions only in exceptional circumstances following a decision by the Russian government.<sup>81</sup>

#### B. FFMS ORDER NO. 08-24/PZ-N (THE ORDER)

FFMS approval is required for the placement and circulation of securities (including depository receipts) outside Russia of both strategic and non-strategic Russian issuers. Prompted by the Law on Strategic Companies, the FFMS adopted the Order, with effect from July 24, 2008, introducing new thresholds for securities that Russian companies can place overseas, particularly in strategic companies.<sup>82</sup>

Following the Order, the FFMS may only grant its approval in accordance with the following restrictions (among others):

A thirty percent threshold (reduced from thirty-five percent): the total shares of a non-strategic Russian company placed or circulated abroad should not exceed thirty percent of its capital. This threshold is five percent for strategic companies conducting geological surveys or exploration or development of major deposits, and it is twenty-five percent for all other strategic companies.

The 30/70 rule (unchanged): at least thirty percent of any additional issue of shares by any Russian company must be offered within Russia.<sup>83</sup>

It should be noted that these restrictions do not apply to the acquisition of shares by foreign investors on Russian stock exchanges or the offshore placement of shares in a foreign holding company with Russian assets.

#### C. CONCLUSIONS

Both of these developments are intended to be consistent with the FFMS's overriding intention to keep liquidity of Russian issuers within domestic financial markets. Russian regulators believe these actions are part of a larger trend among governments to restrict foreign investment in sensitive industries. France, Germany, and, to a lesser extent, the United States, Canada, and Japan have taken steps in this direction.

### VII. Developments in the United Kingdom

In the United Kingdom (U.K.) throughout 2008, the U.K. Financial Services Authority (FSA) has engaged in a number of consultation processes and has produced a number of emergency measures to address market circumstances.

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81. *See id.*

82. *See* FFMS Order No. 08-24/pz-n, ¶ 9 (2008).

83. *See id.*

### A. TRANSPARENCY MEASURES IN RELATION TO CFDs

There has been an FSA consultation process on increased disclosure of Contracts for Difference<sup>84</sup> (CFDs), and the FSA has now published draft rules requiring the disclosure of CFD positions of three percent or above (in line with the disclosure requirements for holdings of shares in UK companies), subject to final technical comments. The FSA aims to issue final rules in February 2009 to come into effect on September 1, 2009.<sup>85</sup>

### B. REVIEWS OF THE LISTING REGIME AND THE SPONSOR REGIME

In January 2008, the FSA announced *A Review of the Structure of the Listing Regime*<sup>86</sup> and posed questions in relation to the retention of the U.K. Listing standards that are super-equivalent to the EU Prospectus Directive requirements. The review includes the Primary Listing regime, the Secondary Listing regime, and the regime for Global Depositary Receipts (GDRs). Following completion of the initial consultation, on December 1, 2008, the FSA issued a feedback statement and consultation paper<sup>87</sup> setting out proposals on how the U.K. Listing Regime can be clearly marked out into "Premium" and "Standard" so market participants understand the differences in the obligations issuers have to meet. Premium and Standard Listings will be open to both U.K. and overseas companies. Under the proposals, Premium Listings will have to meet the U.K.'s super-equivalent standards described above. The Premium segment will only be open to equity securities issued by commercial companies and closed and open-ended investment entities. Standard Listings will cover issues of equities (excluding issues by investment entities), GDRs, and debt and securitized derivatives, which are only required to comply with EU minimum requirements. The FSA will consult on changes to the Listing Rules to reflect the proposals (with responses due by March 1, 2009) and aim to provide feedback in the summer of 2009.

In the feedback statement, the FSA also said it will maintain the current disclosure regime for GDRs and not require sponsors for issuance of GDRs. The FSA had introduced a separate review of the Sponsor regime in March 2008.<sup>88</sup>

### C. REQUIREMENTS FOR LISTING INVESTMENT ENTITIES

The 2008 review of the listing regime followed the FSA announcement of the withdrawal of the Listing Rules' Chapter 14 secondary listing regime for investment funds (previously reported in last year's piece) that came into force in March 2008. There is now a unitary platform for all listed closed-ended investment funds irrespective of domi-

84. See FSA, Disclosure of Contracts for Difference, CP07/20 (2007), [http://www.fsa.gov.uk/pubs/cp/cp07\\_20.pdf](http://www.fsa.gov.uk/pubs/cp/cp07_20.pdf); see also FSA, Policy Update on Disclosure of Contracts for Difference (2008), [http://www.fsa.gov.uk/pubs/cp/cp07\\_20\\_update.pdf](http://www.fsa.gov.uk/pubs/cp/cp07_20_update.pdf).

85. See FSA, Disclosure of Contracts for Difference, CP08/17 (2008), [http://www.fsa.gov.uk/pubs/cp/cp08\\_17.pdf](http://www.fsa.gov.uk/pubs/cp/cp08_17.pdf).

86. See FSA, *A Review of the Structure of the Listing Regime*, DP08/01 (2008), [http://www.fsa.gov.uk/pubs/discussion/dp08\\_01.pdf](http://www.fsa.gov.uk/pubs/discussion/dp08_01.pdf).

87. See FSA, Consultation on Amendments to the Listing Rules and Feedback on DP08/1, CP08/21 (2008), [http://www.fsa.gov.uk/pubs/cp/cp08\\_21.pdf](http://www.fsa.gov.uk/pubs/cp/cp08_21.pdf).

88. See FSA, Sponsor Regime—A Targeted Review, CP08/5 (2008), [http://www.fsa.gov.uk/pubs/cp/cp08\\_05.pdf](http://www.fsa.gov.uk/pubs/cp/cp08_05.pdf).

cile. The FSA has clarified that it may be possible to use the chapter 14 listing route for a special purpose acquisition vehicle (SPAC), provided that the SPAC is not an investment entity.<sup>89</sup>

#### D. MARKET ABUSE REGIME—SUNSET CLAUSES

After consultation, the FSA decided to extend the life of the super-equivalent Sunset Clauses (in relation to misuse of information<sup>90</sup> and behavior likely to give rise to false or misleading impressions or to distort the market<sup>91</sup>) in the U.K. Market Abuse regime, which were due to fall away on June 30, 2008, to December 31, 2009.<sup>92</sup> This extension is due to the current EU review of the Market Abuse Directive and its implementation during 2008.

#### E. DISCLOSURE AND TRANSPARENCY RULES AND MARKET ABUSE REGIME IN RELATION TO GOVERNMENT FUNDING FOR FINANCIAL INSTITUTIONS

In July 2008, the FSA announced that it would consult on a proposal that financial institutions in receipt of liquidity support from a central bank will have a legitimate interest for delaying the public disclosure of such support and published Consultation Paper CP08/13.<sup>93</sup>

#### F. SHORT SELLING RESTRICTIONS AND DISCLOSURE REQUIREMENTS

In June 2008, the FSA used an emergency order and its powers under the Financial Services and Markets Act 2000 (FSMA) to amend the Market Abuse regime in the FSA's Market Conduct sourcebook to ensure an orderly market as the U.K. regulator sees it. The FSA's Short Selling Instrument 2008<sup>94</sup> requires disclosure of short positions in excess of 0.25% of the issued capital of a company in a rights issue period.

On September 18, 2008, the FSA issued the Short Selling (No. 2) Instrument 2008 (the Instrument) banning the creation of or increases in net short positions in U.K. financial sector companies (i.e., U.K. banks and U.K. insurance entities or U.K. incorporated parents of U.K. banks or U.K. insurance entities).<sup>95</sup> Only positions created or increased by market makers are exempt, together with positions created or increased before September 19, 2008. Stock lending is not prohibited by the Instrument. On September 23, 2008, the FSA issued the Short Selling (No. 3) Instrument 2008,<sup>96</sup> amending the definition of a

89. See *Special Purpose Acquisition Companies, LIST!* (FSA), Oct. 2008, [http://www.fsa.gov.uk/pubs/ukla/list\\_oct08.pdf](http://www.fsa.gov.uk/pubs/ukla/list_oct08.pdf).

90. See Financial Services and Markets Act, 2000, c. 8, § 118(4).

91. See *id.* § 118(8).

92. See Financial Services and Markets Act 2000 (Market Abuse) Regulations 2008, S.I. 2008/1439.

93. See FSA, Disclosure of Liquidity Support, CP 08/13 (2008), [http://www.fsa.gov.uk/pubs/cp/cp08\\_13.pdf](http://www.fsa.gov.uk/pubs/cp/cp08_13.pdf).

94. See News Release, FSA, Short Selling Instrument 2008 (June 12, 2008), [http://www.fsa.gov.uk/pubs/press/PN0572008\\_instrument.pdf](http://www.fsa.gov.uk/pubs/press/PN0572008_instrument.pdf).

95. See FSA, Short Selling (No 2) Instrument 2008, 2008/50 (Sept. 18, 2008), [http://www.fsa.gov.uk/pubs/handbook/instrument2\\_2008\\_50.pdf](http://www.fsa.gov.uk/pubs/handbook/instrument2_2008_50.pdf).

96. See FSA, Short Selling (No 3) Instrument 2008, 2008/51 (Sept. 23, 2008), [http://fsahandbook.info/FSA/handbook/LI/2008/2008\\_51.pdf](http://fsahandbook.info/FSA/handbook/LI/2008/2008_51.pdf).

U.K. financial sector company to only include U.K. incorporated parents where the main business of the group to which the parent undertaking and the company (being a U.K. bank or U.K. insurance entity) belong is financial services.

These restrictions and disclosure requirements in relation to short positions in U.K. financial sector companies will expire on January 16, 2009, but were also subject to review thirty days after the order was made. At the end of the thirty-day review period the FSA issued a further order that implemented only minor amendments to the ongoing disclosure obligations.<sup>97</sup> The FSA will continue to review the market conditions and the short selling restrictions.<sup>98</sup>

#### G. IMPLEMENTATION OF THE EU PAYMENT SERVICES DIRECTIVE

The FSA's Consultation Paper 08/14, entitled *Implementation of the Payment Services Directive—Changes to the FSA Handbook*, was published in August, and the period for consultation responses closed on November 28, 2008.<sup>99</sup>

#### H. IMPLEMENTATION OF THE EU 8TH COMPANY LAW DIRECTIVE

The FSA published final rules on June 27, 2008,<sup>100</sup> that came into force on June 29, 2008, amending Disclosure and Transparency Rule 7 in relation to the U.K. implementation of the EU Statutory Audit Directive and the EU Company Reporting Directive.

The FSA also noted that the European Commission has agreed upon transitional (but not final) measures for third country auditors and set out the latest position of the Professional Oversight Board in relation to its regulation of third country auditors.

#### I. IMPLEMENTATION OF THE EU SHAREHOLDER RIGHTS DIRECTIVE

The U.K. Government has recently issued a consultation paper setting out proposals and a draft for implementing legislation for the EU Shareholder Rights Directive for August 2009.<sup>101</sup> Companies whose shares are traded on a regulated market in the European Economic Area (EEA) will have to consider making further changes to their articles of association and the way they run shareholder meetings.

97. See FSA, Short Selling (No 4) Instrument 2008, 2008/60 (Oct. 29, 2008), [http://www.fsa.gov.uk/pubs/handbook/2008\\_60\\_instrument.pdf](http://www.fsa.gov.uk/pubs/handbook/2008_60_instrument.pdf).

98. For further FSA publications in relation to the short selling rules in relation to U.K. financial sector companies, see FSA, Short Selling Instruments and Related Material, <http://www.fsa.gov.uk/pages/Library/Policy/Handbook/short-selling.shtml> (last visited Feb. 25, 2009).

99. See FSA, Implementation of the Payment Services Directive, CP08/14 (2008), [http://www.fsa.gov.uk/pubs/cp/cp08\\_14.pdf](http://www.fsa.gov.uk/pubs/cp/cp08_14.pdf).

100. See FSA, Implementation of the 8th Company Law Directive, PS08/6 (2008), [http://www.fsa.gov.uk/pubs/policy/ps08\\_06.pdf](http://www.fsa.gov.uk/pubs/policy/ps08_06.pdf).

101. See DEP'T FOR BUS. ENTER. & REGULATORY REFORM, IMPLEMENTATION OF THE DIRECTIVE ON THE EXERCISE OF CERTAIN RIGHTS OF SHAREHOLDERS IN LISTED COMPANIES, CONSULTATION DOCUMENT (2008), <http://www.berr.gov.uk/files/file48662.pdf>.

## J. ISSUER LIABILITY

Consultation has been ongoing since 2006 regarding the extension of issuer liability initially in a new Section 90A of FSMA. This section established a statutory civil liability regime for misstatements to the market by issuers of securities admitted to trading on regulated markets, under which issuers are liable for fraudulent misstatements in periodic disclosures to the market as required under the Transparency Directive (2004/109/EC). This section clarified the previously uncertain common law regime. Section 90B of FSMA granted the Government powers to extend the scope of the regime by regulation and published related proposals on July 17, 2008, with responses due by October 9, 2008.<sup>102</sup>

## K. COVERED BONDS

The FSA issued a Policy Statement (PS 08/2)<sup>103</sup> reporting on the main issues arising from the Consultation Paper on proposals for a U.K. Recognized Covered Bonds legislative framework and publishing a final text for the FSA Handbook.

## L. RIGHTS ISSUE REVIEW

In November 2008, the Rights Issue Review Group, a working group tasked with reviewing the rights issue process and pre-emption rights by the Chancellor of the Exchequer, issued its report with its proposal to make the rights issue process more efficient and orderly.<sup>104</sup>

# VIII. Developments in the United States

## A. SEC REGULATIONS IN RESPONSE TO THE FINANCIAL CRISIS

In response to the rapidly evolving financial crisis in the United States, in September 2008, the U.S. Securities and Exchange Commission (SEC) issued several emergency orders that, among other things, banned short selling, with certain exceptions, in the securities of certain financial institutions; adopted certain disclosure requirements for institutional investment managers requiring weekly disclosure of net short positions for trading; adopted Rule 10b-21 under the Securities and Exchange Act of 1934 (the Exchange Act), a new anti-fraud rule prohibiting naked short selling; and suspended the timing and volume restrictions (but not the insider trading limitations) of Rule 10b-18 of the Exchange Act regarding share repurchases.

102. See HM TREASURY, EXTENSION OF THE STATUTORY REGIME FOR ISSUER LIABILITY (2008), [http://www.hm-treasury.gov.uk/d/issuerliability\\_170708.pdf](http://www.hm-treasury.gov.uk/d/issuerliability_170708.pdf).

103. See FSA, Regulated Covered Bonds: Feedback on Proposals for a UK Recognised Covered Bonds Legislative Framework and Final Handbook Text, PS 08/2 (2008), [http://www.fsa.gov.uk/pubs/policy/ps08\\_02.pdf](http://www.fsa.gov.uk/pubs/policy/ps08_02.pdf).

104. See HM TREASURY, A REPORT TO THE CHANCELLOR OF THE EXCHEQUER: BY THE RIGHTS ISSUE REVIEW GROUP (2008), [http://www.hm-treasury.gov.uk/d/pbr08\\_rightsissue\\_3050.pdf](http://www.hm-treasury.gov.uk/d/pbr08_rightsissue_3050.pdf) (U.K.).

On September 18, 2008, the SEC issued an emergency order banning short selling of the securities of financial institutions,<sup>105</sup> requiring institutional investment managers to report short sales of certain publicly traded securities on new Form SH, which is filed non-publicly with the SEC,<sup>106</sup> and banning naked short sales of all public securities.<sup>107</sup> The ban on short selling of securities of certain financial institutions terminated on October 17, 2008, once it was deemed that the securities markets in the United States had sufficiently stabilized. But the emergency order concerning disclosure on Form SH was temporarily extended to August 1, 2009, with some modifications.<sup>108</sup> The modified rule requires institutional investment managers holding accounts with securities having an aggregate fair market value of at least \$100 million to file Form SH with the SEC within a week of effecting a short sale of such securities.<sup>109</sup> In its final rule, the SEC clarified that Form SH does not need to be filed on a weekly basis if (i) there have been no short sales effected since the previous filing of a Form SH; (ii) the short sale or position constitutes less than 0.25% of that class of the issuer's securities; and (iii) the fair market value of the short sale position is less than one million dollars.<sup>110</sup> Finally, the SEC has continued its ban on naked short selling. In order to implement the ban, the SEC amended Regulation SHO by requiring that short sellers and their broker-dealers deliver securities by the close of business on the settlement date (i.e. three days after the sale transaction) and by adopting Rule 10b-21, a short selling anti-fraud rule that targets short sellers who deceive broker-dealers and other market participants in their intention or ability to deliver securities in time for settlement.<sup>111</sup>

Prior to the deepening of the financial crisis in September 2008, the SEC had already begun a ten-month investigation into three major credit rating agencies (Fitch Ratings Ltd., Moody's Investors Services, Inc., and Standard & Poor's Ratings Services), which was concluded in July 2008. On July 8, 2008, the SEC announced its conclusions from the investigation, which revealed that none of the rating agencies examined had specific written procedures for rating residential mortgage-backed securities and collateralized debt obligations, which had significantly increased since 2002.<sup>112</sup> The SEC also found that significant aspects of the ratings process were neither always disclosed nor well-documented, and conflicts of interest were not well managed. To address these issues, in June 2008, the SEC proposed a three-fold set of comprehensive reforms to regulate conflicts of interests, disclosures, internal policies, and business practices of credit rating agencies.

105. See Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, Exchange Act Release No. 34,58592 (Sept. 18, 2008), available at <http://www.sec.gov/rules/other/2008/34-58592.pdf>.

106. See Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, Exchange Act Release No. 58591 (Sept. 18, 2008), available at <http://www.sec.gov/rules/other/2008/34-58591.pdf>.

107. See Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934 Taking Temporary Action to Respond to Market Developments, Exchange Act Release No. 34,58572 (Sept. 17, 2008), available at <http://www.sec.gov/rules/other/2008/34-58572.pdf>.

108. See Disclosure of Short Sales and Short Positions by Institutional Investment Managers, Exchange Act Release No. 34,58785 (Oct. 15, 2008), available at <http://www.sec.gov/rules/final/2008/34-58785.pdf>.

109. See *id.*

110. See *id.*

111. See Exchange Act Release No. 34,58572, *supra* note 107.

112. See Press Release, SEC, SEC Examinations Find Shortcomings in Credit Rating Agencies' Practices and Disclosure to Investors (July 8, 2008), available at <http://www.sec.gov/news/press/2008/2008-135.htm>.

The SEC addressed the first set of reforms by proposing to amend Rule 17g of the Exchange Act and Form NRSRO concerning the disclosure and management of certain conflicts of interests faced by credit rating agencies.<sup>113</sup> The second set of rulemaking initiatives dealt with improving investor understanding of the risks of structured finance products by requiring credit rating agencies to differentiate the ratings they issue on structured products versus bonds and explaining the differences to investors. The third and final set of proposed rules was issued on July 1, 2008, and was meant to clarify for investors the limits and purposes of credit ratings to ensure that investors did not unduly rely on credit agency ratings.<sup>114</sup> Comments on the proposed rules were due in September 2008, but it is unclear when the SEC will publish the final rules.

#### B. FORM D AMENDMENTS

On February 8, 2008, the SEC adopted final rules mandating the electronic filing of Form D and revising Regulation D of the Securities Act of 1933 (the Securities Act) and Form D in order to simplify and update the disclosure requirements.<sup>115</sup> Form D is filed by issuers to provide notice of an offering of securities exempt from registration under the Securities Act in reliance on the Regulation D exemptions.<sup>116</sup> Issuers have already been permitted to file Form D electronically since September 15, 2008, and will be required to file electronically on and after March 16, 2009.<sup>117</sup> As was previously the case, Form D is required to be filed within fifteen days of an issuer's first sale of unregistered securities in reliance on the Regulation D exemptions. The type of information disclosed on Form D has also been amended, including requiring revenue range information, reporting the date of first sale in the offering, and replacing the business description with an industry classification for the issuer, among other changes.<sup>118</sup> The revised Form D will be required beginning on and after March 16, 2009. The amended Regulation D also clarifies when amendments to Form D are and are not required.<sup>119</sup>

#### C. FOREIGN ISSUER REPORTING ENHANCEMENTS

On September 23, 2008, the SEC published final rules on foreign issuer reporting enhancement amending the test for eligibility of foreign private issuers (FPIs), accelerating

113. See Proposed Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 34,57967 (June 16, 2008), available at <http://www.sec.gov/rules/proposed/2008/34-57967.pdf>.

114. See References to Ratings of Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 34,58070 (July, 2008), available at <http://www.sec.gov/rules/proposed/2008/34-58070.pdf>.

115. See Electronic Filing and Revision of Form D, Exchange Act Release No. 33,8891, (Feb. 8, 2008) available at <http://www.sec.gov/rules/final/2008/33-8891.pdf>.

116. Regulation D was enacted by the SEC in the 1980s to provide exemptive relief from the registration requirements of the Securities Act for limited securities offerings and was meant to reduce the burden of capital fundraising for small businesses. Regulation D consists of three separate exemptions for limited offerings, which are included in Exchange Act Rules 504, 505, and 506. Form D is also used to provide notice of exempt offerings under section 4(6) of the Securities Act.

117. See Exchange Act Release No. 33,8891, *supra* note 115.

118. See *id.*

119. See *id.* The SEC stated that amendments to Form D are required (i) to correct a material error or mistake of fact; (ii) to provide an update annually if the offering is continuing at that time; and (iii) to disclose a material change in information previously filed.



the filing deadline of annual reports filed by FPIs on Form 20-F, and amending certain disclosure requirements on Form 20-F and the registration statements used by FPIs.<sup>120</sup>

Previously, the eligibility test for FPI status required issuers to monitor throughout the year whether they qualified as FPIs, which allowed them to maintain their eligibility to use special forms, including Form 20-F, and to remain exempt from certain SEC regulations. The newly adopted rules now provide that issuers need only assess their eligibility for FPI status once a year, on the last business day of their second fiscal quarter. New registrants have to test their status as of a date within thirty days prior to the filing of their initial registration statement with the SEC. If an issuer determines that it no longer qualifies for FPI status, then it is required to comply with the reporting requirements of U.S. domestic issuers beginning on the first day of its next fiscal year.<sup>121</sup>

The SEC also accelerated the reporting deadline for annual reports filed by FPIs on Form 20-F from six months to four months after the issuer's fiscal year-end for all filers regardless of their size. This change will become effective for fiscal years ending on or after December 15, 2011, following a three-year transition period.<sup>122</sup>

Finally, the SEC has adopted several new and amended disclosure requirements for Form 20-F and registration statements filed by FPIs. These changes (and their effective dates for compliance) include (i) eliminating an accommodation that permitted FPIs to omit segment data from their U.S. GAAP financial statements (effective December 15, 2009); (ii) requiring additional footnote disclosures in a FPI's financial statements as required by U.S. GAAP (effective December 15, 2011); (iii) requiring disclosure on an annual basis of changes in an issuer's certifying accountant (effective December 15, 2009); (iv) requiring disclosure of fees and other payments made by holders of American Depositary Receipts (ADRs) to depositaries on an annual basis (effective December 15, 2009); and (v) requiring a concise summary disclosure of the significant ways in which a FPI's corporate governance practices differ from the corporate governance practice of U.S. companies listed on the same exchange on an annual basis (effective December 15, 2008).<sup>123</sup>

#### D. AMENDMENTS TO RULE 12G3-2(B) REGISTRATION EXEMPTION

On September 5, 2008, the SEC adopted final rules amending Rule 12g3-2(b) of the Exchange Act that provide one of two exemptions from SEC registration often relied upon by FPIs that are not registered with the SEC but have placed securities to U.S. investors under SEC registration exemptions such as Rule 144A. Rule 12g3-2(b) has also often been used by FPIs to establish unsponsored ADR facilities for their shares.<sup>124</sup> Previously, the exemption under Rule 12g3-2(b) exempted FPIs from registration if the issuer applied for an exemption and furnished to the SEC certain non-U.S. disclosure docu-

120. See Final Rules on Foreign Issuer Reporting Enhancements, Exchange Act Release No. 33,8959 (Sept. 23, 2008), available at <http://www.sec.gov/rules/final/2008/33-8959.pdf>.

121. See *id.*

122. See *id.*

123. See *id.*

124. See Final Rules on Exemption from Registration Under Section 12(g) of the Securities Exchange Act of 1934 for Foreign Private Issuers, Exchange Act Release No. 34,58465 (Sept. 5, 2008), available at <http://www.sec.gov/rules/final/2008/34-58465.pdf>.

ments by paper submission (i.e., information it made public or was required to make public under the laws of its home country and information it was required to file with an exchange). FPIs also had to provide the number of U.S. shareholders and percentage of shares held by them.

The most significant change to Rule 12g3-2(b) was to permit FPIs to claim the exemption automatically without having to submit a written application to the SEC provided that the following conditions are met: (i) the issuer is not required to file reports under Exchange Act Sections 13(a) and 15(d); (ii) the issuer currently maintains a listing of securities on an exchange in a foreign jurisdiction that constitutes its primary trading market; and (iii) the issuer has published specified non-U.S. disclosure documents in English on its website or through an electronic information delivery system in its primary trading market.<sup>125</sup>

The SEC noted that these amendments are intended to make foreign companies' disclosure better available to U.S. investors without cost and in English. Most issuers who currently rely on the Rule 12g3-2(b) exemption will continue to be able to claim the exemption under the amended rules. The amended Rule 12g3-2(b) became effective on October 10, 2008; however, those FPIs that cannot meet one or more of the conditions to maintain the automatic exemption and are not otherwise exempt<sup>126</sup> will have a three-year transition period (until October 10, 2011) to complete SEC registration under Section 12.<sup>127</sup>

#### E. AMENDMENTS TO THE CROSS-BORDER TENDER OFFER RULES

On September 19, 2008, the SEC adopted final rules regarding significant changes to the cross-border rules to ensure greater U.S. investor participation in cross-border tender, exchanges, and rights offers.<sup>128</sup> The most significant amendment involved changing the measurement date of U.S. ownership for purposes of determining eligibility for the Tier 1 (where U.S. holders hold less than ten percent of the securities) and Tier 2 (where U.S. holders hold more than ten percent but less than forty percent of the securities) exemptions from U.S. tender offer rules and registration requirements. Previously, U.S. ownership was assessed on the thirtieth day prior to commencement of an offer. This test proved to be too rigid for some jurisdictions. To provide additional flexibility, the SEC amended the measurement date by allowing bidders to use any date sixty days before announcement or thirty days after announcement of the offer. Those bidders that are "unable" to use the 60-30 day test due to local regulatory peculiarities, for example, may be able to use any date within 120 days before public announcement to assess the relative U.S. ownership. For hostile offers and in other situations where the bidder cannot con-

125. *See id.*

126. Some FPIs may be exempt from SEC registration under Rule 12g3-2(a). This rule exempts FPIs whose equity securities are held of record by less than 300 U.S. residents, even if the issuer has 500 or more record holders on a worldwide basis as of the end of its most recently completed fiscal year. Rule 12g3-2(a) has not been amended and remains in force.

127. *See* Exchange Act Release No. 34,58465, *supra* note 124.

128. *See* Final Rules on Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions, Exchange Act Release No. 33-8957 (Sept. 19, 2008), *available at* <http://www.sec.gov/rules/final/2008/33-8957.pdf>.

duct the look-through as of the date within the extended time frame, the SEC has provided an alternate test that allows bidders to rely on the average daily trading volume of the subject security to determine eligibility for Tier 1 or Tier 2 exemption. For rights offerings, the amended rule permits calculations as of a date within sixty days before or thirty days after the record date. The SEC's amendments also provided that it will no longer exclude holders of more than ten percent of the class of securities subject to the offer from the calculation and expanded the scope of the Tier 1 and Tier 2 exemptions by, for example, expanding Tier 1 relief for going-private transactions and extending the Tier 2 exemption to multiple foreign tender offers concurrent with a U.S. offer. The final rules also expanded the types of institutional investors who may file a Schedule 13G to report their beneficial ownership of more than five percent of a class of equity securities.<sup>129</sup> The amended rule now allows certain foreign institutions to file the short-form Schedule 13G at the end of the year, rather than the longer Schedule 13D that must be filed every time the five percent threshold is breached.<sup>130</sup> The final rules became effective on December 8, 2008.

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129. *See id.*

130. Previously, foreign institutions had to obtain exemptive relief in the form of a no-action letter from the SEC in order to be allowed to make their disclosures on Schedule 13G. The amended rules codify the no-action relief previously granted to allow foreign institutions to file Schedule 13G so long as they can certify on Schedule 13G that they are subject to a regulatory scheme "substantially comparable" to the regulatory scheme applicable to their U.S. counterparts and that they undertake to furnish to the SEC, upon request, the information they otherwise would be required to provide in a Schedule 13D.

